may well be that evidence as to a skid and the surrounding circumstances thereof may lead to a proper inference that it was caused by negligent driving but in the absence of such evidence either as to the skid itself or any surrounding circumstances I do not think that it can be said that, *prima facie*, and by itself, it is sufficient evidence upon which to convict.

"Negligence" has been defined as "doing something which ought either to be done in a different way or not done at all or omitting to do something which ought to be done" (Alderson B. in *Blythe v. Birmingham,*[2]) and a later description by Lord Atkin in *Andrews v. Director of Public Prosecutions,*[1] is "the omission of a duty to take care". It may be that negligence gives rise to both criminal proceedings and civil proceedings by an injured party but it does not necessarily follow that because there is a civil claim established by a person against another that that other has also become criminally responsible in the same matter. There is a distinction to be drawn between a negligent act or omission which gives rise to civil or criminal responsibility. In the latter case the test was laid down in the C.C.A. by the Lord Chief Justice in *Rex v. Bateman*[5] as follows:—

> "In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, the Judges have used many epithets such as 'culpable' 'criminal' 'gross' 'wicked' 'clear' 'complete'. But whatever epithet may be used and whether an epithet be used or not in order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment".

It is true that this was a case of manslaughter not caused by negligent driving but it has subsequently been cited and followed as defining what amounts to criminal negligence and it seems to me that the degree of criminal negligence that it is necessary to prove does not depend on whether death results from the negligence or otherwise, as was laid down in the House of Lords in *Andrews v. Director of Public Prosecutions*[1]. In a civil case once negligence is proved, the degree of negligence is irrelevant but in a criminal case the degree of negligence is the determining question.

It seems to me therefore that to apply *dicta* and decisions in civil cases where, whether by reason of a skid or otherwise, injuries have been caused to another through collision with a motor car and damages have been awarded to such other person, is quite inapposite when one has to consider whether or not there has been that degree of negligence which amounts to a criminal offence.

Appeal allowed—conviction quashed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) & GORDON-SMITH, J.A.

July 11, 1939.

CHEOW KEOK - - Appellant

v.

PUBLIC PROSECUTOR - Respondent.

[SELANGOR CRIMINAL APPEAL No. 1 of 1939]

Penal Code (Cap. 45) Section 304A.

C. K. was convicted by the First Magistrate, Kuala Lumpur, sitting as the Magistrate, Kajang, of an offence against section 304A of the Penal Code arising out of the driving of a motor vehicle and sentenced to three months rigorous imprisonment.

On appeal to the Court of a Judge (Aitken, J.).

Held, that while the evidence disclosed a considerable degree of rashness or negligence—"that I should have no hesitation in substituting a conviction for the offence of dangerous driving **contra** to section 25 of the Road Traffic Enactment, 1937, had I the power to do so"—section 304A of the Penal Code was nothing more than an attempt to codify the offence designated in English law as manslaughter by negligence—that the principles of English common law should be applied to interpret that attempt at codification and that the same high degree of negligence was necessary to support a conviction under the section as was required to support a conviction for manslaughter by negligence in England—the negligence must be so great as to satisfy a jury that the offender had a wicked mind in the sense of being reckless and careless whether death occurred or not. Appeal allowed and conviction set aside.

On Appeal by the Public Prosecutor under section 45A of the Courts Enactment (Cap. 2) to the Court of Appeal.

Held, (Affirming Aitken, J.) that the same high degree of negligence must be proved before a person could properly be convicted of an offence against section 304A Penal Code as would be required to be proved to sustain a conviction for manslaughter by negligence in England and that English authorities should be followed.

Lai Tin v. Public Prosecutor[11] overruled.
Andrews v. Director Public Prosecutions[1] followed.

Cases referred to:—

(1) *Andrews v. Director of Public Prosecutions,* (1937) A.C. 576.

(2) *Attorney General v. Pang Ah Yew,* (1925) A.C. 555; 3 M.L.J. 184.

(3) *Bank of New South Wales v. Piper,* (1897) A.C. 383.

(4) *Bristol Tramways Co. v. Fiat Motors,* (1910) 2 K.B. 831.
(5) *Courtauld v. Legh,* (1869) L.R. 4 Ex. 126.
(6) *Grey v. Pearson,* (1857) 6 H.L.C. 61; 10 E.R. 1216.
(7) *Gundry v. Pinniger,* 21 L.J. Ch. 405.
(8) *Kanji v. Emperor,* (1938) A.E.R. (Sind.) 100.
(9) *Khoo Sit Hoh v. Lim Thean Tong,* (1912) A.C. 323.
(10) *King Emperor v. Joti Parshad Gupta,* (1932) A.I.R. All 18.
(11) *Lai Tin v. Public Prosecutor,* (1939) M.L.J. 248.
(12) *Lochgelly Iron and Coal Co. v. McMullan,* (1934) A.C. 1.
(13) *Mohamed Syedol Ariffin v. Yeoh Ooi Gark,* (1916) 2 A.C. 575; 1 M.C. 165.
(14) *Montgomerie and Co. v. Wallace-James,* (1904) A.C. 73.
(15) *In re Parrott,* (1891) 2 Q.B.D. 151.
(16) *Powell and Wife v. Streatham Manor Nursing Home,* (1935) A.C. 243.
(17) *Public Prosecutor v. Salleh bin Abu,* (1939) M.L.J. 54.
(18) *Queen v. Poor Law Commissioners,* (1838) 6 A. & E. 56.
(19) *Queen v. Salmon & ors.,* 6 Q.B.D. 79.
(20) *Reg. v. Dant,* 10 Cox Cr. C. 102.
(21) *Rex v. Bateman,* 19 Cr. App. Rep. 8.
(22) *Rex v. Chhui Yi,* 5 M.L.J. 177; (1936) S.S.L.R. 129.
(23) *Robinson v. Canadian Pacific Railway Co.,* (1892) A.C. 481, 487.
(24) *Spencer v. Met. Board of Works,* (1882) 22 Ch. D. 142.
(25) *Woolmington v. Rex,* (1935) A.C. 462.

W. G. W. Hastings for Appellant.

J. F. Draper, Deputy Public Prosecutor, for Public Prosecutor.

Hastings:—The appeal is to be heard *de novo* as from the Magistrate. I have to begin. The appellate Judge was right in quashing the conviction but wrong in holding that there was any evidence of negligence on the part of the appellant. The inferences drawn by the Magistrate from the admitted facts were not justified.

(*Mr. Hastings* then argued the appeal on the facts—The Court intimated that if they required to hear him on the law he would be called on to reply).

Draper.—The argument for the Prosecution is three-fold:—

> First: That there was a finding of fact by the Magistrate based on evidence—notably the evidence of the Transport Board expert—and that such finding should not have been disturbed by the Judge. The Judge was not in as good a position to appreciate the facts as the Magistrate who visited the scene of the occurrence and who heard the witnesses examined and cross-examined. The principle is that the decision of the Magistrate must not be reversed or set aside unless it is shewn that it was either wrong in law or against the weight of the evidence [Criminal Procedure Code (Cap. 6) section 321]. A finding of fact by a Court of First instance should not be lightly disturbed—*Powell and wife v. Streatham Manor Nursing Home*[16]; *Khoo Sit Hoh v. Lim Thean Tong* [9]; *Montgomerie & Co v. Wallace-James*[14].

The theories of the Judge on how the occurrence in question took place were not advanced by either side —are not supported by any evidence—and can be demonstrated to be incorrect by simple reference to an enlarged copy of the plan put in at the trial (Their Lordships, however, declined to look at the enlarged copy produced) *Draper,* Deputy Public Prosecutor, then dealt with the facts and proceeded:

> Second: The Judge should have given effect to his finding that the appellant was guilty of a considerable degree of rashness or negligence amounting to the offence of dangerous driving *contra* to section 25 of the Road Traffic Enactment by convicting him of that offence.

Criminal Procedure Code (Cap. 6) sections 173 (*h*), 316 (*b*) and 321.

(On question of notice of prosecution) *Public Prosecutor v. Salleh bin Abu*[17]:

> Third: That "rash or negligent act" in section 304A of the Penal Code does not mean either a rash act or a negligent act of such a degree as would justify conviction for the felony of manslaughter in England. The offence created by the section is a summary one to which comparatively light punishment is attached. The decision of Murray-Aynsley, J., in *Lai Tin v. Public Prosecutor*[11] is correct and correctly lays down what the law of the Federated Malay States

is on this section. If the principles of construction which have been laid down and acted on by the great masters of the law in the past, the construction of the section is easily arrived at and the result certain. These principles are (*a*) If the language of a statute is free from doubt it must be interpreted according to its ordinary and natural meaning and it is not permissible to accept a construction derived from any other law if thereby the true and actual meaning of the statute under construction be varied or denied effect *Mohamed Syedol Ariffin v. Yeoh Ooi Gark*[13]. The Penal Code is a code complete in itself—and unless for some special reason the pre-existing law of this country—much less of England—is not to be taken into account in construing a codifying Act—"I rather deprecate the citation of earlier decisions. The object and intent of the Statute was no doubt simply to codify the unwritten law applicable to the sale of goods but in so far as there is an express statutory Enactment that alone must be looked at and must govern the rights of the parties even though the section may to some extent have altered the prior common law." [*Cozens Hardy M. R. in Bristol Tramways Co. v. Fiat Motors*[4]]. 'The purpose of such a Statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities . . . . an appeal to earlier law and decisions for the purpose of interpreting a statutory code can only be justified on some special ground" [*Lord Watson in Robinson v. Canadian Pacific Co.*[23]];

(*b*) 'The great fundamental principle in construing wills, and indeed, Statutes and all written instruments is that the grammatical and ordinary sense of the words is to be adhered to unless that would lead to absurdity or some repugnancy or inconsistency with the rest of the instrument' [*Lord Wensleydale in* **Grey v. Pearson*[6]]. This rule has been stated by Lord Cranworth as a cardinal rule from which, if we departed, we should launch into a sea of difficulties not easy to fathom [*Gundry v. Pinniger*[7]].

(*c*) 'It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament' [per *Cleasby B. in Courtauld v. Legh*[5]]. "*Prima* facie the same words must be interpreted in the same sense in different parts of a Statute . . . . we disclaim altogether the assumption of any right to assign different meanings to the same words in an Act of Parliament" [per Lord Denman, C.J., in *The Queen v. Poor Law Commissioners*[18]]. "I take it also as a general rule in construing Statutes that the same word must be *prima facie* construed in the same sense in the different parts of the Statute" [Chitty, J.—*Spencer v. Met. Board of Works*[24]].

(*d*) The expressions "negligent" "negligently" "rash or negligent" "rashly or negligently" are found in the following sections of the Penal Code: Sections 129, 269, 279, 280, 284, 285-7, 304A, 336-8. It is impossible to apply a double standard of negligence to most of these offences . . . . The negligence or rashness is the same throughout—the results of that negligence or rashness differ. Negligence as mentioned in section 304A must mean the same thing as negligence mentioned in the other sections referred to. Moreover, it must mean a different thing from "rashness" "for as it has been justly remarked when precision is required no safer rule can be followed than always to call the same thing by the same name and it is at all events reasonable to presume that the same meaning is intended for the same expression in every part of an Act [*Courtauld v. Legh (supra)*]. The expression "negligence" should therefore be construed in its ordinary and natural meaning—it should be given an even construction throughout the Penal Code —the local Penal Code alone should be looked to for, as Lord Shaw said, in *Mahomed Syedol Ariffin v. Yeoh Ooi Gark (supra)* "the view of their Lordships is that the rule and principle of the Colony must be accepted as it is found in its own Evidence Act, and that the acceptance of a rule or principle in or derived from English law is not permissible if thereby the true and actual meaning of the Statute under construction be varied or denied effect" or as Lord Carson put it in *Attorney-General v. Pang Ah Yew*[2] "it must be borne in mind that the liability of the Crown (in the Colony) is created by Statute and renders in many respects the reasoning on which English cases have been decided entirely inapplicable." I cite also the judgment of Whitley, Ag. C.J., in *Rex v. Chhui Yi*[22] "We do not think that the decision in *Woolmington v. Rex*[25] can have any effect on our law. That decision dealt with the common law of England" and *King Emperor v. Joti Prasad Gupta*[10]. On this basis there is no necessity to introduce into our Code what Cave, J. (as he then was) called "fine drawn and subtle distinctions" [*in re Parrott*[15]]. This is particularly desirable as the Code, in the main, falls to be administered by Magistrates who are not professional lawyers, who must find it difficult to differentiate between negligence and negligence which is described

*Cited with approval in Swami's case [(1939) 1 A.E.R. (P.C.) 396.]

as "gross" "wicked" "complete", etc. It is manifestly absurd to tell such Magistrates that they may convict a person for an offence under section 304A of the Penal Code if the negligence is such that it amounts to a crime and may not convict him under the section if the negligence proved is a matter for compensation. That is where *Andrews* v. *Director of Public Prosecutions* (*supra*) has left the law in England—and while it is no part of my case to attack that decision I do refer to the comments upon the judgments in the Law Quarterly [Vol. III at page 306 and also at page 380] as a reason for showing that the case should not be imported into our Statute law to give a plain word an interpretation other than the interpretation given to the word by a Standard Dictionary or a gloss to the Enactment which is neither necessary or desirable. The negligence here alleged is such as falls within the definition in Para. 2681 p. 1360 *Gour* Vol. I 4th Ed. "It is an essential rule for the preservation of Society that no member thereof should jeopardize its existence by any act criminal, unlawful or negligent . . . . The offence extends as much to wilful acts as to acts done heedlessly but in the presence of the danger thereby threatened . . . . and of which the accused had knowledge or belief". *Mayne* on the Criminal Law of India Third Ed. "Mere negligence is made punishable apart from any injury actually done . . . . the occurrence of actual injury meets with punishment under sections 337 and 338 . . . . nor is it necessary that there should be any intention to injure or reason to anticipate the particular injury that ensued, if it was in fact caused by the defendant's negligence . . . . it is sufficient if the carelessness is such as does cause or is likely to cause injury."

On the question of *mens rea*—An intention to offend against the penal provisions of a Statute constitutes *mens rea; Bank of New South Wales v. Piper*[3].

The Deputy Public Prosecutor also cited;

Queen v. *Salmon and others*[19];

Halsbury (*Hailsham* Ed.) Vol. 23, 568;

Kanji v. *Emperor*[8];

Lochgelly Iron and Coal Co. v. *McMullan*[12] and proceeded: *Rex.* v. *Bateman*[5] commences the divergence from the principle established in the earlier cases, viz., that if a person will, without taking proper precautions, do an act which is in itself dangerous, even though not an unlawful act in itself, and in the course of it he kills another person, he does a criminal act which in law constitutes manslaughter—*Reg* v. *Dant*[20]; The English Rule that negligence must be "gross" to sustain an indictment for manslaughter is of doubtful origin and certainly not of great antiquity. It seems to owe its origin to *Rex* v. *Bateman* (*supra*) a special case on very special facts. This case has been unreasonably extended. Until now no Judge can with certainty direct a jury in these manslaughter by negligence cases. There is no reason for and many reasons against the introduction of the extravagant legal concepts referred to in the local code which is a plain simply expressed Code designed so that he who runs may read.

Hastings in reply: The Penal Code has never been enacted directly in this country. It was enacted by reference. Section 7 of the Revised Edition of the Laws Enactment 1932. The Penal Code of the Straits Settlements.

Cur. adv. vult.

The judgment of the Court was delivered as follows:

In this case the appellant was convicted by the Magistrate, Kuala Lumpur, of an offence under section 304A of the Penal Code and sentenced to three months rigorous imprisonment; his driving licence was also suspended for a period of one year. He appealed against this conviction; Aitken, J., allowed the appeal and set aside the conviction and sentence.

The Public Prosecutor, under the provisions of section 45A of the Courts Enactment, has certified that the determination of this appeal involves a point which it is desirable in the public interests to have determined by the Court of Appeal; but what the point was, was not stated. Mr. Draper who appeared for the Public Prosecutor, however, stated that the point was purely one of law in regard to which there were conflicting decisions and that an authoritative decision was required for the guidance of Magistrates who principally deal with offences under section 304A of the Penal Code. The decisions in question are in regard to the degree of negligence it is necessary to prove before an offence under this section can be established.

In the unreported case of *Lai Tin* v. *Public Prosecutor,*[11] (Perak Mag. Cr. Appeal No. 86 of 1938), Murray Aynsley, J., held that it was not necessary to prove the same degree of negligence under section 304A as was required under English law to support a conviction of manslaughter. He did, however, in the course of his judgment state that:

> "I would not go so far as to say that the degree of negligence necessary to support a civil action should be applied without reservation. A criminal charge and a civil action should be approached in a different spirit. But English law as I have said has a double standard of negligence in criminal law, and I do not consider that section 304A gives any basis for the suggestion that such a double standard should be applied here".

In the present case Aitken, J., refused to follow this decision and, after reference to English authorities which made it manifest that a very high degree of negligence must be proved before an accused person can properly be convicted or an indictment for manslaughter by negligence, held that the same degree of negligence is required to prove an offence under section 304A of the Penal Code.

We have no hesitation in coming to the conclusion that Aitken, J.'s interpretation of the law is the correct one. Mr. Draper argued that English decisions on Common Law offences had no application to offences under the Penal Code; that as the Federated Malay States criminal law was codified we should only consider that Code and interpret negligence in its ordinary meaning and not interpret it as meaning "gross negligence"

If we were to adopt this argument, we should be putting an interpretation of this section which, as far as we know, with the exception of the case previously referred to, has never been placed on it before either in India, Malaya, or in other countries where a criminal code based on the Indian Penal Code is in force. Further, as Aitken, J., points out, section 304A is a codification of the English Common Law offence of manslaughter by negligence.

This section did not appear in the original Indian Penal Code; it was added thereto by an amending Act of 1870. *Gour* (5th Ed. page 1044) states in regard to such amendment:

> "This supplied an omission providing for the offence of manslaughter by negligence which had been provided for by the two clauses in the draft code but which appear to have been unaccountably omitted from the code when it was finally enacted".

And at page 1045:

> "it (i.e., a rash or negligent act) corresponds exactly to what is designated in English law as manslaughter by negligence".

Mr. Draper referred us to two Indian cases. Of these, in *King Emperor* v. *Gupta*[10], it was held, in reference to offences under the Salt Act, that English principles of Common Law cannot be engrafted upon the Indian Acts. This case, however, has no application, as the Salt Act is not, as section 304A is, a codification of English Common Law. The other case, *Kanji* v. *King Emperor*[8] does not in any way support Mr. Draper's argument, for the following passage occurs in the judgment:

> "Section 304A Indian Penal Code requires a **mens rea** or a guilty mind. The rashness or negligence must be such as to be described criminal. The Phrase 'criminal negligence' as used in ordinary conversation conveys something of the meaning. Mere carelessness is not sufficient".

In general, this judgment is in accordance with the principles laid down in the most recent English cases of manslaughter by negligence.

There are other reasons for treating the word "negligence" differently in civil and criminal proceedings. Take the word "prove" for instance. In all criminal cases in the British Empire such word used in regard to a criminal prosecution means "to prove beyond all reasonable doubt". In civil proceedings such strict proof is not necessary; it is only necessary to establish a balance of probabilities.

In view of the above we have no doubt that English authorities may be followed in considering whether an offence under section 304A is established, and that being the case, we have not the slightest hesitation in coming to the conclusion that Aitken, J.'s statement of the law is correct.

He referred to the two leading cases on the point; viz: *Rex* v. *Bateman*[21] and *Andrews* v. *Director of Public Prosecutions*[1], the latter a House of Lords decision. From these authorities it is plainly manifest, as Aitken, J., held that:

> "a very high degree of negligence must be proved before an accused person can properly be convicted in England on an indictment for manslaughter by negligence and the same very high degree of negligence is required to establish an offence under section 304A".

It is unnecessary that we should examine in detail these authorities. Aitken, J., has done so, and we need only state that we entirely agree with the conclusions he arrived at.

Apart from this point of law, Mr. Draper argued that the evidence abundantly established that the appellant was guilty of gross negligence, and that the Judge was wrong in holding that it did not.

The Judge accepted that evidence which the Magistrate accepted, but pointed out that the Magistrate arrived at his conclusions entirely as a result of inferences drawn from the marks found on the road at the scene and from the positions in which the lorry

and car respectively were found immediately after the accident. The Judge, was, therefore, as he stated in this judgment, in just a good position to draw the correct inferences from those marks and positions.

We do not think it is necessary that we should examine in detail the Judge's reasons for dissenting from the Magistrate. It does not appear to be a matter of public importance if a Judge, without infringing any provisions of the law, considers that the evidence did not prove beyond all reasonable doubt that an offence had been committed, and further we are informed that the point for determination was a point of law. In regard to this aspect of the case we need only state we agree with the Judge that the evidence was insufficient to establish the charge.

For the above reasons we are of the opinion that the conviction and sentence of the appellant should be set aside.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]

GORDON-SMITH, Ag. J.A.

July 24, 1939.

A.M.M. MURUGAPPA CHETTIAR

v.

S. SEENIVASAGAM & OTHERS.

[PAHANG CIVIL APPEALS Nos. 1, 2 and 3 of 1935]

[PAHANG CIVIL SUITS Nos. 1, 2, 5 and 7 of 1934]

Costs—taxation—no certificate for two counsel—charges for attendances on and conferences with counsel—whether allowable—counsel's fees and refreshers charged in disbursement column—transposition of items to profit costs column.

In a bill of costs of the Solicitors for the defendants, although there was no certificate for two counsel, certain items were charged for conferences with counsel, and an item of $2,480/- made up as to $2,000/- as fee on brief and $480/- as refreshers appeared in the disbursement column. On taxation, the Registrar reduced the amounts of the various items charged for attendances on counsel in order to bring them within the scale laid down. As regards counsel's brief fee and refreshers, the bill was amended, at the suggestion of the Registrar, by transposing the items to the profit costs column at the figures of $1,500/- and $384/- respectively; the Registrar thought these were reasonable fees to be paid by the plaintiff and he accordingly allowed them. On an appeal from the Registrar's decision.

Held, that the various items charged for conferences with counsel were properly chargeable in a solicitor's bill and for work done as a Solicitor.

Held further, that inasmuch as fees on brief and refresher fees were entirely in the discretion of the Taxing Master and the Taxing Master had reasonably exercised his discretion, his decision in this respect must be confirmed.

APPEAL against taxation.

Ramani in support of the Appeal.

This is an Appeal against taxation and raises three separate matters.

Firstly, the Registrar was wrong in allowing fees for Solicitor's attendance and conference in addition to allowing the fees for counsel. There was no certificate for two counsel and such an allowance really involves the payment of remuneration for work done by two members of the Bar instead of one.

Secondly, the Registrar was wrong in having transposed an item of disbursement being counsel's fees as an item of profit costs after he had taxed the same. By reason of such transposition he made a present of an extra 25 per cent to the Respondent.

Thirdly, at the stage of an Appeal charges incidental to a litigant's personal presence however useful and necessary is not a proper charge the burden of which should be thrown on an unsuccessful litigant.

Hastings for Respondents:—

There are two methods of taxing a bill when a counsel not a member of the firm of solicitors instructed is employed; one is to charge a getting-up fee and the ordinary fee for attendance in Court, the other is to charge as a solicitor instructing counsel. In the latter case no getting-up fee can be allowed, but in place of it a brief fee is chargeable. This was done in this case and there is no item allowed by the Registrar which is not a proper item under this principle.

I admit the last item of $25.00 is unusual and can only be supported under the special circumstances of this case.

Gordon-Smith, Ag. J.A.—This was an appeal from the Registrar's decision in respect of various items in the bill of costs of the Defendants' Solicitors, taxed under a notice dated the 14th June, 1939. As various questions of principle arose and the matter was somewhat complicated, I thought that it might be desirable to record my decision formally in writing and lay down or reiterate certain principles which should be observed in regard to Counsel's fees. Before doing so, however, I will deal with the actual items of the Bill objected to on this appeal.